Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

Nos. 91-744 and 91-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Petitioners,

v.

ROBERT P. CASEY, *et al.*,
Respondents.

ROBERT P. CASEY, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

DAVID W. OGDEN *
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Attorneys for Amicus Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. PENNSYLVANIA'S COMPELLED SPOUSAL NOTIFICATION REQUIREMENT SEVERELY BURDENS WOMEN'S RIGHT TO CHOOSE	5
A. Many Women With Compelling Reasons For Non-Disclosure Are Not Exempted From The Act's Spousal Notification Requirement	6
B. Many Women Who Would Otherwise Be Exempted From Compelled Spousal Notification Are Burdened Because They Are Unable To Use The Statutory Exemptions	9
C. Mandatory Spousal Notification Places Extraordinary Burdens On Wives Who Have Decided Not To Notify Their Husbands Of The Planned Abortion	13
D. There Is No Empirical Support For The Proposition That Compelled Spousal Notification Promotes The Integrity Of The Marital Relationship	16
II. THE "INFORMED CONSENT" PROVISIONS OF THE PENNSYLVANIA ACT ARE UNCONSTITUTIONAL	18
A. The "Informed Consent" Provisions Require The Dissemination Of Exaggerated And Misleading Information That May Be Harmful To Women	20

TABLE OF CONTENTS—Continued

Page

B. The Mandatory Disclosure Provisions Interfere With Effective Counseling And Are Designed Not To Inform But To Bias Women Against Having Abortions 24

C. The Twenty-Four Hour Mandatory Delay Severely Burdens A Woman's Right To Choose 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: Page

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 16
City of Akron v. Akron Center for Reproductive Health, Inc., 461 U.S. 416 (1983) 1, 18, 19, 24, 28, 29
Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) 1, 5, 6, 16, 17, 18, 19
Planned Parenthood v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990), *aff'd in part & rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3998 (1992) ..... *passim*
Planned Parenthood v. Casey, 947 F.2d 682 (3d Cir. 1991), *cert. granted in part*, 60 U.S.L.W. 3998 (1992) 11, 14, 16, 28, 29
Planned Parenthood v. Danforth, 428 U.S. 52 (1976) 18
Roe v. Wade, 410 U.S. 113 (1973) 4, 16
Rust v. Sullivan, 111 S. Ct. 1759 (1991) 24
Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 1, 18, 22, 24, 25, 26, 27
Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) 1, 16

STATUTORY AND REGULATORY PROVISIONS:

Pennsylvania Abortion Control Act

18 Pa. C.S.A. § 3205 ..... 18, 24, 26
18 Pa. C.S.A. § 3205(a) 2, 3, 28
18 Pa. C.S.A. § 3205(a)(1) 25, 26
18 Pa. C.S.A. § 3205(a)(2) 3, 18, 23, 25
18 Pa. C.S.A. § 3205(b) 26, 27
18 Pa. C.S.A. § 3208 ..... 18, 19, 20, 23, 24
18 Pa. C.S.A. § 3208(a)(1) 3
18 Pa. C.S.A. § 3208(a)(2) 3, 20, 27
18 Pa. C.S.A. § 3209 13
18 Pa. C.S.A. § 3209(a) 2, 16
18 Pa. C.S.A. § 3209(b)(1) 2, 9
18 Pa. C.S.A. § 3209(b)(2) 2
18 Pa. C.S.A. § 3209(b)(3) 2, 10
18 Pa. C.S.A. § 3209(b)(4) 2, 11

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsych. 446 (1975) 21

Adler, *Psychological Responses of Women Following Abortion* (1989) (Testimony before the Subcommittee on Human Resources, U.S. House of Representatives Committee on Government Relations) 22

Adler, David, Major, Roth, Russo & Wyatt, *Psychological Responses After Abortion*, 284 Science 41 (1990) 15, 21, 22

Adler & Dolcini, *Psychological Issues in Abortions for Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) 21, 22

APA COMMITTEE ON ACCREDITATION, ACCREDITATION HANDBOOK (1980) 25

American Psychological Ass'n, *Ethical Principles of Psychologists*, 45 Am. Psychologist 390 (1990) 24

Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 Western J. Med. 188 (1975) 22

A. BROWNE, WHEN BATTERED WOMEN KILL (1987) 9, 13

Browne, *Violence Against Women: Report of the Council on Scientific Matters, Am. Medical Ass'n* (in press) 11

Browne, *The Victim's Experience: Pathways to Disclosure*, 28 Psychotherapy 150 (1991) 13

Condon, *Psychological Disability In Women Who Relinquish a Baby For Adoption*, 144 Med. J. of Australia 117 (1986) 20

D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983) 17

Deykin, Campbell & Patti, *The Postadoption Experience of Surrendering Parents*, 54 Am. J. Orthopsych. 271 (1984) 21

TABLE OF AUTHORITIES—Continued

Page

Fagan, Stewart & Hansen, *Violent Men or Violent Husbands? Background Factors and Situational Correlates*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 64 (D. Finkelhor, R. Gelles, G. Hotaling & M. Straus eds. 1983) 12

Finkelhor & Yllo, *Rape in Marriage: A Sociological View*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 119 (D. Finkelhor, R. Gelles, G. Hotaling, M. Straus eds. 1983) 7, 10, 11

Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsych. 503 (1977) 22

Henshaw & Van Vort, *Abortion Services in the United States; 1987 and 1988*, 22 J. Fam. Planning Perspectives 102 (1990) 28, 29

Gelles, *Violence and Pregnancy: A Note On the Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975) 12

Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. Marriage and Fam. 84 (1984) 12

R. GELLES & M. STRAUS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY (1988) 8, 12, 14

R. GOLD, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? (1990) 29

Harding, *Postpartum Psychiatric Disorders: A Review*, 30 Comprehensive Psychiatry 109 (1989) 20

Helton, McFarlane & Anderson, *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1338 (1987) 12

HOUSE COMM. ON GOVERNMENT OPERATIONS, THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTIONS ON WOMEN, H.R. REP. No. 392, 101st Cong., 2d Sess. 14 (1989) 23

TABLE OF AUTHORITIES—Continued

Page

Janoff-Bulman & Frieze, *A Theoretical Perspective for Understanding Reaction to Victimization*, 39 J. Soc. Issues 1 (1983) 13

Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 J. Psychosomatic Obstetrics & Gyn. 141 (1985) 21, 22

Maracek, *Consequences of Adolescent Childbearing and Abortion*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96 (G. Melton ed. 1986) 22

McFarlane, *Battering During Pregnancy: Tip of an Iceberg Revealed*, 15 Women and Health 69 (1989) 12

NATIONAL ACADEMY OF SCIENCES/INSTITUTE OF MEDICINE, LEGALIZED ABORTION AND THE PUBLIC HEALTH (1975) 22

Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 Am. J. Orthopsych. 48 (1972) 21

Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Soc. Research 183 (1987) 6, 9, 14, 16

Randall, *Domestic Violence Intervention Calls For More Than Treating Injuries*, 268 J. Am. Med. Ass'n 939 (1990) 11

D. RUSSELL, RAPE IN MARRIAGE (1982) 10, 11

Russo, Horn & Schwartz, *U.S. Abortion in Context: Selected Characteristics and Motivations of Women Seeking Abortions*, J. Soc. Issues, manuscript (in press) 5, 7, 26

Russo & Zierk, *Abortion, Childbearing, and Women's Well-Being*, Prof. Psychology Research and Prac., manuscript (in press) 14, 20, 21, 22, 23

Ryan & Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. Marriage and Fam. 41 (1989) 5, 6, 7, 10, 17

TABLE OF AUTHORITIES—Continued

Page

Shelton, Brann & Shultz, *Abortion Utilization: Does Travel Distance Matter?*, 8 J. Fam. Planning Perspectives 260 (1976) 28

Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976) 22

Stark & Fitarft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE 293 (Van Hasselt, Morrison, Bellack & Hessen eds. 1988) 12

Straus & Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys*, 48 J. Marriage and Fam. 465 (1986) 12

Straus & Sweet, *Social Psychological Characteristics Associated With Verbal Aggression Between Husbands and Wives*, J. Marriage and Fam., manuscript (in press) 8

C. TIETZ, J. FORREST & S. HENSHAW, INTERNATIONAL HANDBOOK ON ABORTION (P. Sachdev ed. 1988) 15

C. TIETZE & S. HENSHAW, INDUCED ABORTION: A WORLD VIEW (6th ed. 1986) 29

Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Planning Perspectives 169 (1988) 15

U.S. Dept. of Justice, *Criminal Victimization in the United States, 1989: A National Crime Survey Report*, NCJ-129391 (1991) 10

L. WALKER, THE BATTERED WOMAN SYNDROME (1984) 7, 8, 12, 14

BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE [1]

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 114,000 members and affiliates, including the vast majority of United States psychologists holding doctoral degrees. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

APA has participated frequently as an amicus in this Court and filed briefs in, *inter alia*, *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).

Two issues raised by the Pennsylvania Abortion Control Act ("Pennsylvania Act" or "Act") are of particular interest to APA and its members. First, the Commonwealth prohibits abortion unless a woman first notifies her husband of her decision to undergo the procedure, regardless of the adverse consequences of compelled notification. Second, the Commonwealth mandates the provision of specific, sometimes misleading, information to women seeking abortion, without regard to whether such information is sought or is appropriate to the needs and circumstances of particular women. Counseling, including pre-abortion counseling, is an integral component of the functions psychologists are educated to perform.

---

[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court.

Empirical research is relevant to both these issues, and much of the research has been conducted by APA members. That research is presented in this brief.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3209 of the Pennsylvania Act stipulates that no physician may provide an abortion to a married woman unless the woman executes a signed statement that she has notified her husband about the abortion. 18 Pa. C.S.A. § 3209(a). A woman may omit spousal notice only if she certifies that: her husband is not the father, *id.* § 3209(b)(1); her husband, after diligent effort, could not be found, *id.* § 3209(b)(2); the pregnancy is the result of spousal assault that has been reported to appropriate law enforcement authorities, *id.* § 3209(b)(3); or she has reason to believe that notifying her husband is likely to result in the infliction of bodily injury upon her, *id.* § 3209(b)(4). The signed document must indicate that any false statement is punishable by law.

This compelled spousal notification places a substantial burden on a married woman's choice to terminate her pregnancy. Research shows that although the vast majority of wives *voluntarily* discuss planned abortions with their husbands, those women who decide *not* to do so have compelling reasons: they fear detrimental effects to themselves, their marriages, their spouses, or others. The Act supplants a married woman's presumptively rational decision not to tell her husband with the decision of a legislature not familiar with her circumstances or those of her family. Under the statute, a husband *must* be notified except in four narrow circumstances. Critically, many of the compelling reasons women have for nondisclosure to their husbands are not recognized within the statutory exemptions. Moreover, even if a woman has reasons the legislature has recognized as valid, she may

[2] Counsel gratefully acknowledge the assistance of APA staff members Janet O'Keeffe, Dr. P.H., Lisa Goodman, Ph.D., Brian Wilcox, Ph.D., Corinne Lindquist, M.A. and Gwendolyn Keita, Ph.D.

be unable to use the prescribed waiver procedure. Accordingly, the Act may impose an intolerable choice on a married woman: forgo an abortion she has decided is in her own or her family's best interest or face the potentially devastating consequences of notification. This burden cannot be justified by the Commonwealth's interest in promoting the integrity of the marital relationship. Empirical evidence suggests that compelled spousal disclosure of a planned abortion is most often harmful to the marriage. Part I.

The Pennsylvania Act also precludes provision of an abortion without what it terms the woman's "voluntary and informed consent." 18 Pa. C.S.A. § 3205(a). The statute provides that, except in the case of a medical emergency, a woman's consent is valid "if and only if," at least 24 hours prior to the abortion, the referring or treating physician or other health care professional orally tells the woman, *inter alia*, that (i) the Commonwealth publishes a brochure, which she has a right to review, that "describes the unborn child and list[s] agencies which offer alternatives to abortion"; (ii) medical assistance, also discussed in the brochure, may be available if she carries the pregnancy to term; and (iii) fathers are liable for child support. *Id.* § 3205(a)(2). The woman must be provided a copy of the brochure if she requests it. Before undergoing the abortion, every woman must certify in writing that she has received this information.

The Act dictates the contents of the government-created brochure. The brochure must include "objective information describing . . . the possible detrimental psychological effects of abortion," *id.* § 3208(a)(2); "[g]eographically indexed materials designed to inform the woman of public and private agencies and services available to assist [her] through pregnancy, upon childbirth and while the child is dependent, including adoption agencies," *id.* § 3208(a)(1); and "realistic" "pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival," *id.* § 3208(a)(2).

These provisions confuse the purpose and process of obtaining "informed consent" with that of pre-abortion counseling. Such counseling, which is unlike traditional notions of "informed consent" for a specific medical procedure, should be designed to assist women in deciding whether to undergo an abortion through consideration of *all* relevant factors, most of which, for many women, are not "medical" in nature. The inflexible "counseling" mandated by the Commonwealth is likely to be contrary to the best interests of many women who are subject to it and severely burdens their right to choose.[3] *First*, some of the state-mandated information is actually exaggerated and misleading. Contrary to the impression conveyed by the Commonwealth's brochure, *empirical research does not support the contention that abortion is a significant risk factor for detrimental psychological effects.*[4] Misrepresenting the psychological sequelae of abortion—particularly when the psychological effects of its alternatives are omitted—may actually compromise a woman's recovery from an abortion. *Second*, requiring counselors to give the *same* litany of information to every pregnant woman, regardless of its relevance to or likely impact on her, is the antithesis of effective counseling. Indeed, it may result in unnecessary anxiety, stress and harm to many women. *Further*, the dictated information is biased—obviously designed more to discourage a woman from choosing to terminate her pregnancy than to inform her decision. As such, it forces health care providers to slant their "counseling" toward a politically dictated outcome, and may serve only to confuse and distress many women. Part II.

---

[3] The mandatory, inflexible 24-hour waiting period exacerbates the burdens imposed by the "informed consent" provisions of the Act and is independently unconstitutional. *See infra*, pp. 27-30.

[4] The lack of support for claims that abortion is frequently psychologically damaging, and the demonstrated risks of psychological harm that sometimes inhere in carrying an unwanted pregnancy to term, undercut arguments for overruling *Roe v. Wade*, 410 U.S. 113 (1973), based on concern about pregnant women's mental health.

ARGUMENT

I. PENNSYLVANIA'S COMPELLED SPOUSAL NOTIFICATION REQUIREMENT SEVERELY BURDENS WOMEN'S RIGHT TO CHOOSE.

The decision whether to have a child is made in the total context of the particular marital relationship and is influenced by all aspects of that relationship. Research shows that the vast majority of married women—more than 92%—*voluntarily* consult with their husbands prior to having an abortion.[5] The Pennsylvania spousal notification requirement cannot further any state interest in those instances.[6]

Married women who, in the absence of compelled spousal notification, decide not to inform their husbands of their pregnancy and intention to have an abortion generally have good reasons based upon their beliefs about the negative consequences of such disclosure. The most detailed study to date strongly suggests that women who do not notify their husbands are already involved in troubled marriages; many base their decision not to inform their husbands on current marital problems, including separation since conception, or fear that discussion of pregnancy and abortion would make a bad situation

---

[5] Ryan & Plutzer, *When Married Women Have Abortions: Spousal Notification and Marital Interaction*, 51 J. Marriage and Fam. 41, 45 (1989) [hereinafter Ryan & Plutzer]. In this study of 506 women (12% of whom were married), every married woman who told her husband she was pregnant also discussed the abortion decision with him. *Id.* at 44. Married women are not an insignificant proportion of the women seeking abortions; in 1987, nearly one in five abortion patients was married. Russo, Horn & Schwartz, *U.S. Abortion in Context: Selected Characteristics and Motivations of Women Seeking Abortions*, J. Soc. Issues, manuscript at 8-9 (in press) [hereinafter Russo]. [Authorities cited in this brief are available to the Court upon request to counsel.]

[6] *Cf. Hodgson*, 110 S.Ct. at 2945 (holding that statute requiring two-parent notification "would not further any state interest" in family setting where the second parent is voluntarily notified by the first parent).

worse and reconciliation more difficult.[7] Other women base their decision on fears concerning their own emotional or physical well-being.[8] Still other women indicate that they did not tell their husbands of the pregnancy and abortion in order to protect their spouses from emotional hardship or crisis.[9]

A. Many Women With Compelling Reasons For Non-Disclosure Are Not Exempted From The Act's Spousal Notification Requirement.

Empirical evidence supports the District Court's conclusion that "[t]he exceptions do not provide adequate protection for pregnant wives with perfectly valid reasons for not informing [their] husband[s] of the decision" to terminate their pregnancies. *Planned Parenthood v. Casey*, 744 F. Supp. 1323, 1386 (E.D. Pa. 1990). Many of the compelling reasons for non-disclosure are simply not recognized in Section 3209.

1. *No exception is provided where the woman fears that notification will harm the marriage.* In many if not most marriages, serious problems arise at some point. These may lead to separation and divorce; they may persist; or they may be resolved. Procreation and the decision to have an abortion may be intricately intertwined with these marital difficulties. As noted, one study shows that many women who do not notify their husbands cite marital difficulties and fear of harming their

---

[7] Ryan & Plutzer, *supra* n.5, at 46. Three-fourths of the women who did not inform their husbands of their abortion reported extra-marital affairs or marital difficulties of some sort. *Id.*

[8] *Id.* Spousal abuse—both physical and psychological—is not uncommon. Its victims may reasonably fear that notification would prompt further abuse. *See infra* at 7-8, 11-13. *Cf. Hodgson* 110 S.Ct. at 2945 & n.36 (notification of second parent most often does not occur because the second parent is a child-batterer or spouse-batterer and "notification would have provoked further abuse").

[9] Ryan & Plutzer, *supra* n.5, at 46; Plutzer & Ryan, *Notifying Husbands About An Abortion: An Empirical Look at Constitutional and Policy Dilemmas*, 71 Sociology and Soc. Research 183, 186 (1987) [hereinafter Plutzer & Ryan].

marriages, as the reason for nondisclosure.[10] In another comprehensive nationwide empirical study, 17%-28% of married adult women mentioned partner-related reasons for seeking abortion.[11] Under the Pennsylvania scheme such women *must* notify their husbands and risk the destructive impact on their marriages, or forego the abortion.

2. *No exception is provided where the woman fears notification will negatively affect her husband.* A woman may fear that her husband is not psychologically prepared to cope with an unplanned or unwanted pregnancy, whether terminated or not; or as the District Court suggested, where "her husband is suffering from an illness, [the woman may] fear[] communication concerning the decision could worsen his condition." 744 F. Supp. at 1386 n.42. Section 3209 forces her to risk such injury, or forego the abortion.

3. *No exception is provided where the woman fears she will be psychologically or emotionally abused as a result of notification.* Domestic abuse is not limited to infliction of "bodily injury." Many researchers have noted the high prevalence and traumatic effects of psychological or emotional spousal abuse.[12] Indeed, some of the most respected researchers in the area have described emotional abuse as "[t]he most hidden, most insidious, least

---

[10] Ryan & Plutzer, *supra* n.5, at 46.

[11] Russo, *supra* n.5, at 17. 17.2% of the married mothers (*i.e.*, married women with one or more children) and 28.3% of the married non-mothers cited partner-related reasons for seeking an abortion, including fear that the marriage might break up. *Id.*, at Table 5.

[12] Finkelhor & Yllo, *Rape in Marriage: A Sociological View*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 119 (D. Finkelhor, R. Gelles, G. Hotaling, M. Straus eds. 1983) [hereinafter Finkelhor & Yllo]; L. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter Walker].

researched, and perhaps in the long run most damaging form of intimate victimization." [13]

Psychological abuse takes many forms. Reported psychological aggression by husbands toward their wives includes insulting and swearing, threatening physical assault, and destruction of physical property in the home.[14] Other studies report threats, isolation, degradation, close monitoring or surveillance, withholding of transportation, and economic control.[15] Section 3209 requires victims of psychological abuse, no matter how serious, to give their husbands prior notice of the pregnancy and planned abortion even if the wives believe that such notice will cause their husbands to victimize them further. The only alternative is to forego the abortion.

4. *No exception is provided for women who fear that notifying their husbands of their planned abortion will result in physical or psychological abuse of someone other than themselves.* An abusive husband may seek to control his wife through physical or psychological harm to their children, or threats of such harm.[16] To exercise their

[13] R. GELLES & M. STRAUS, INTIMATE VIOLENCE: THE CAUSES AND CONSEQUENCES OF ABUSE IN THE AMERICAN FAMILY 67 (1988) [hereinafter Gelles & Straus].

[14] Straus & Sweet, *Social Psychological Characteristics Associated With Verbal Aggression Between Husbands and Wives*, J. Marriage and Fam., manuscript at 7 (in press). In one national study that examined the prevalence of psychological abuse in marital relationships, 74% of the husbands engaged in one or more attacks during the year covered by the study. *Id.* at 9.

[15] Walker, *supra* n.12, at 28-29. This study focused on abuse of battered women. However, forms of psychological abuse used by men who physically abuse their wives may also be employed by men who do not. Moreover, although battered women theoretically may be exempted from spousal notification if they fear "bodily injury" as a result of notification, they—like women who are not physically abused by their husbands—cannot obtain a waiver if they fear only *psychological* abuse as a result of compelled notification.

[16] In one study, 57% of the battered women reported that their spouses had threatened to kill someone else including their children. Walker, *supra* n.12, at 42. Another study of women who even-

constitutional right to terminate their pregnancies, these women must first notify their abusive husbands, regardless of the devastating effects.

B. Many Women Who Would Otherwise Be Exempted From Compelled Spousal Notification Are Burdened Because They Are Unable To Use The Statutory Exemptions.

Many women with reasons for not notifying their husbands recognized as valid in the Act's narrow statutory exemptions will be unable to use these exemptions for a variety of reasons.

The statute makes an exception for a married woman impregnated by someone other than her husband, *but only if she certifies this fact in writing.* 18 Pa. C.S.A. § 3209(b)(1). That is, to be exempted from the obligation to notify her husband, the woman must execute an official document saying that she has become pregnant as a result of an extra-marital affair.[17] The Act offers no assurance that this document will remain confidential, or be protected from subpoena. *See* 744 F. Supp. at 1361. Thus, a woman would rationally fear the consequences of making such a certification.[18] Research strongly suggests that disclosure to the husband when he is not the

tually killed their abusive husbands found that 83% of the husbands had threatened to kill someone other than their wives. A. BROWNE, WHEN BATTERED WOMEN KILL 65 (1987) [hereinafter *When Battered Women Kill*].

[17] There may be other reasons that the husband is not the father, such as when the woman is raped by someone else. In those circumstances, a woman may not want to disclose her rape and subsequent pregnancy and abortion, for fear of rejection by her husband.

[18] In the one study to date directly concerning spousal notification, almost half of the women who had been involved in extramarital affairs and had not notified their husbands of their pregnancies and abortion decisions, indicated a concern about anybody finding out about the pregnancy. Plutzer & Ryan, *supra* n.9, 186. A principal concern is likely to be preventing the husband from learning about the affair.

father is generally harmful to both the woman and the future of the marriage.[19]

Section 3209 also provides that the husband need not be notified if the pregnancy resulted from statutorily-defined "spousal sexual assault," *but only if the wife has reported her husband to law enforcement authorities having jurisdiction over the matter.* 18 Pa. C.S.A. § 3209(b)(3). Evidence strongly suggests that this reporting requirement renders this exception virtually meaningless. Marital rape is a common, though neglected aspect of spouse abuse.[20] But marital rape (like other forms of domestic violence) is vastly underreported. One study concluded that only 9.5% of sexual assaults by husbands, ex-husbands and co-habitating partners are reported to the police.[21]

There are many reasons for a woman's reluctance to report rape and attempted rape (within and outside marriage) to law enforcement officials. According to the most recent National Crime Survey Report, women who did not report the sexual assaults to police gave the following reasons: 16.6% believed that the event was a private or personal matter; 14% reported the matter to a person *other* than a law enforcement official; 11.5% feared a reprisal; 11.3% cited lack of proof; 4% believed the police were too ineffective, inefficient, or biased; and 2.5% said the police would not want to be bothered.[22] Clinical

---

[19] Ryan & Plutzer, *supra* n.5, at 46 (citing studies).

[20] Estimates of the percentage of American women sexually assaulted by their own husbands, ex-husbands or co-habitating partners range from 10% to 14%. Eighty-five percent of the women are raped. Finkelhor & Yllo, *supra* n.12, at 121; D. RUSSELL, RAPE IN MARRIAGE 57 (1982) [hereinafter Russell].

[21] Russell, *supra* n.20, at 303.

[22] U.S. Dept. of Justice, *Criminal Victimization in the United States, 1989: A National Crime Survey Report*, NCJ-129391, at 96-97 (1991).

observations suggest *marital* rape is underreported for these and additional reasons. Many women, believing in notions of "wifely duty" or obligation, do not define a forced sexual experience with a husband as "rape" or "sexual assault."[23] Those women who acknowledge such experiences as spousal rape have other reasons for not reporting: self-blame, shame, and fear of not being believed.[24] The Third Circuit also noted "the devastating effect that a report to law enforcement authorities is likely to have on the marital relationship and the economic support provided the wife by the marriage." *Planned Parenthood v. Casey*, 947 F.2d 682, 713 (3d Cir. 1991). These women are unlikely to overcome their reluctance to report, and suffer such consequences, in order to have an abortion.[25]

Finally, the Act exempts women who fear notification will result in bodily injury to themselves,[26] *but only if they certify their fear in writing. See* 18 Pa. C.S.A. § 3209(b)(4). Research suggests that it is unrealistic to expect battered women to do this. The vast majority of wives

---

[23] In the most comprehensive study to date, only 7% of the women who met the criteria for having been raped by their husbands (*e.g.*, force, threat of force, or consent is not possible because of woman's physical state) mentioned the experience when asked if they had ever been the victim of rape. Russell, *supra* n. 20, at 52-53.

[24] Finkelhor & Yllo, *supra* n.12, at 126; Browne, *Violence Against Women: Report of the Council on Scientific Affairs, Am. Medical Ass'n*, at 15 (in press).

[25] The ninety-day reporting requirement under Pennsylvania's spousal sexual assault statute "further narrows the class of sexually abused wives who can claim the exception, since many of these women may be psychologically unable to discuss or report the rape for several years after the incident." 744 F. Supp. at 1362.

[26] Domestic violence is the single most common cause of injury to women in the United States and is responsible for 22-35% of emergency room visits by women. Randall, *Domestic Violence Intervention Calls For More Than Treating Injuries*, 268 J. Am. Med. Ass'n 939 (1990). The most comprehensive study of vio-

are unlikely to report their abusive experience to a health care provider. Research indicates that only 24.1% of women who experience "minor violence" (*e.g.*, slapping) and 37.9% of the victims of "severe violence" (*e.g.*, kicking or hitting with a hard object) at the hands of their husbands report the abuse to human services personnel (including psychologists, physicians, nurses, and staff of community mental health centers or other social service or counseling agencies).[27]

Women do not report these abusive experiences for a number of reasons. Clinical observations suggest that for many victims, battering has been such a constant part of family life that they may define their experiences as

---

lence in American families conducted to date revealed that one out of eight wives had been struck by her husband during the year covered. Straus & Gelles, *Societal Change and Change in Family Violence From 1975 to 1985 as Revealed by Two National Surveys*, 48 J. Marriage and Fam. 465, 470 (1986). A review of available epidemiological research on domestic violence concluded that 20-25% of women in the United States have been physically abused by a male intimate. Stark & Fitarft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE 293, 300 (Van Hasselt, Morrison, Bellack & Hessen eds. 1988).

Research on domestic violence has demonstrated that pregnancy does not deter and may even precipitate physical attacks by batterers. Gelles, *Violence and Pregnancy: A Note On the Extent Of The Problem And Needed Services*, 24 Fam. Coordinator 81 (1975); Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. Marriage and Fam. 84 (1984); Helton, McFarlane & Anderson, *Battered and Pregnant: A Prevalence Study*, 77 Am. J. Pub. Health 1338 (1987); Walker, *supra* n.12, at 51. Still other data indicate that battering becomes more severe during pregnancy, potentially causing severe injury to the woman. Fagan, Stewart & Hansen, *Violent Men or Violent Husbands? Background Factors and Situational Correlates*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 64 (D. Finkelhor, R. Gelles, G. Hotaling & M. Straus eds. 1983); Helton, McFarlane & Anderson, *supra*, at 1338; McFarlane, *Battering During Pregnancy: Tip of an Iceberg Revealed*, 15 Women and Health 69, 72 (1989).

[27] Gelles & Straus, *supra* n.13, at 237.

normative.[28] Further, defining oneself as a victim can be a painful process, requiring alterations of one's self-perception and perception of the perpetrator.[29] Even when they recognize it as battery, women may be reluctant to report violence out of family loyalty, distrust of people outside their own ethnic or social group, or desire to protect their families' privacy.[30] Battered women may, in addition, fear retaliation by their husbands.[31] The risk of disclosure may also seem too great when victims are economically dependent on their abusers, or when they fear that disclosure could destroy the integrity of the family unit.[32] Given the fact that the confidentiality of the spousal notification exemption form cannot be guaranteed, many battered women will be reluctant to implicate their husbands. Compelling spousal notification in such instances is likely to intensify or exacerbate an already traumatic and emotionally volatile situation.

C. Mandatory Spousal Notification Places Extraordinary Burdens On Wives Who Have Decided Not To Notify Their Husbands Of The Planned Abortion.

The burdens Section 3209 places on wives who would not otherwise notify their husbands of their decision to terminate their pregnancies are numerous and significant. *First*, in many circumstances, rather than notify her spouse about the abortion or utilize an exemption, a woman may forego the abortion. These women avoid compelled spousal notification, but only at the cost of sacrificing their right to choose.

---

[28] Browne, *The Victim's Experience: Pathways to Disclosure*, 28 Psychotherapy 150 (1991) [hereinafter Browne].

[29] *Id.* at 151; Janoff-Bulman & Frieze, *A Theoretical Perspective for Understanding Reaction to Victimization*, 39 J. Soc. Issues 1, 5 (1983).

[30] Browne, *supra* n.28, at 152.

[31] *When Battered Women Kill*, *supra* n.16, at 114.

[32] Browne, *supra* n.28, at 152-53.

Second, a woman who *does* notify her husband of her intention to undergo an abortion because the Act makes it a precondition to terminating her pregnancy, may nonetheless be denied the ability to exercise her choice, as both lower courts concluded. 744 F. Supp. at 1385; 947 F.2d at 712-13. Several of the women in the most comprehensive study of spousal notification indicated that they did not tell their husbands of their planned abortion for fear that the men would insist that they continue the pregnancy.[33] Forced notification to husbands who strongly oppose abortion "will predictably result in an effort to prevent the abortion." 947 F.2d at 712. Empirical data show that women in abusive marriages are particularly susceptible to successful attempts to block their right to choose.[34]

Third, as the District Court correctly concluded, "the woman who is forced to notify her husband . . . in order to obtain an abortion despite her better judgment to the contrary will be subjected to additional anxiety and stress." 744 F. Supp. at 1385. Unwanted pregnancy is itself a stressful experience.[35] The spousal notification requirement only increases the stress by forcing a pregnant woman to choose between equally intolerable alternatives: (1) to notify her husband of her planned abortion and suffer the consequences, the fear of which had led her to decide not to notify him in the first place; or (2)

---

[33] Plutzer & Ryan, *supra* n.9, at 186.

[34] One study of battered women showed that, in violent relationships, men prevailed in 73% of the major disagreements. Walker, *supra* n.12, at 28-29. Moreover, the largest proportion of battered wives in another study reported that, in order to stop the violence, they consciously avoid confrontational situations with their husbands. Gelles & Straus, *supra* n.13, at 259 (53% of the "minor violence" group and 69% of the "severe violence" group).

[35] Russo & Zierk, *Abortion, Childbearing, and Women's Well-Being*, Prof. Psychology Research and Prac., manuscript at 3 (in press) [hereinafter Russo & Zierk].

to forego the abortion, which may result in the very harm she had hoped to avoid by not disclosing her pregnancy and having the abortion.[36]

Fourth, the decision-making and notification imposed by the Act's spousal notice requirement will result in later,[37] and thus more hazardous and more expensive abortions.[38]

Fifth, the spousal notice requirement demeans and stigmatizes married women. Of all the reproductive-related medical procedures a woman can undergo, abortion alone requires spousal notification. Married women are not required to notify their husbands before obtaining tubal ligations or hysterectomies, for example. Moreover, Pennsylvania law is strikingly one-sided: husbands are not required to inform their wives before undergoing reproductive-related medical procedures, such as sterilization.[39] Nor are unmarried women deprived of their autonomy in making the abortion decision. Section 3209 thus sends a clear message to married, pregnant women

---

[36] In those cases where an exemption might apply, the woman has a third, often unacceptable option: certifying that she fits within one of the statutory exceptions—and taking any steps necessary to qualify, such as notifying the police of her husband's sexual assault—and suffering the consequences.

[37] In one study examining the reasons why women have late abortions, one-third of the women indicated that they were afraid to tell their partners or parents; 8% reported that they were waiting for the relationship with their partners to change. Torres & Forrest, *Why Do Women Have Abortions*, 20 Fam. Planning Perspectives 169 (1988).

[38] *See* 744 F. Supp. at 1385. The period of gestation at which an abortion is performed is related to the potential medical and psychological effects of the procedure. Adler, David, Major, Roth, Russo & Wyatt, *Psychological Responses After Abortion*, 248 Science 41 (1990) [hereinafter Adler]; C. Tietze, J. Forrest & S. Henshaw, International Handbook on Abortion (P. Sachdev ed. 1988).

[39] *See* 744 F. Supp. at 1362-63, 1387 n.44.

that their judgment on the abortion issue alone is not trusted or respected.[40]

As the Third Circuit concluded, "if § 3209 is allowed to go into effect, abortions can and will be prevented . . . and wives can and will be penalized . . . for electing abortions." 947 F.2d at 713.

D. There Is No Empirical Support For The Proposition That Compelled Spousal Notification Promotes The Integrity Of The Marital Relationship.

This Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Carey v. Population Servs. Int'l, 431 U.S. 678, 696 (1977) (plurality opn.). The right to secure an abortion is fundamental, *Roe v. Wade*, 410 U.S. 113 (1973), protected at a minimum against the imposition of "undue burden[s]," *Webster v. Reproductive Health Services*, 109 S. Ct. at 3063 (O'Connor, J., concurring); *Hodgson v. Minnesota*, 110 S. Ct. at 2949-50 (O'Connor, J., concurring). There can be no serious question, for the reasons set forth above, that Section 3209 imposes a substantial burden on married women's right to terminate their pregnancies.

Pennsylvania seeks to justify its burdensome spousal notification requirement, *inter alia*, as "promoting the integrity of the marital relationship." 18 Pa. C.S.A.

---

[40] *See* Plutzer & Ryan, *supra* n.9, at 187 (noting that spousal notification statutes "send[] the message that women do not have autonomy in their reproductive decisions" as well as "the alternative, unintended message that only single, sexually active women are free to exercise the choice of an abortion without the interference of the man involved").

§ 3209(a).[41] The Commonwealth's rationale necessarily assumes either that women are wrong in believing notification will have an adverse impact or that any adverse impact will be outweighed by the enhancement to the marriage compelled notification purportedly would promote. Both assumptions are unfounded.

Studies suggest that married women are capable of making reasonable judgments regarding the effect notification would have on themselves and/or the harmony of their marital relationships.[42] Women who believe notification will be beneficial *voluntarily* notify their husbands. For that small minority who conclude that notification will adversely affect them, their spouses, their children, or their marriages, there is no reason to believe that the Commonwealth is in a position to make a better judgment. As the Court held in *Hodgson*, "the State has no legitimate interest in questioning one parent's judgment that notice to the other parent" of their minor daughter's intent to have an abortion would not be in the family's best interest. 110 S. Ct. at 2945. For the same reasons, the Commonwealth surely has no legitimate interest in questioning a married woman's judgment that notification to her husband would not be wise.

Nor is there support for the assumption that compelled notification (when the woman has decided against it) has a positive effect on the marital relationship. To the contrary, the productive communication patterns of a normal, healthy marriage are based upon trust and the *voluntary* desire to share or to know; compelled or coerced communication lacks these qualities.[43] Indeed, compelled notification may actually be *detrimental* to the marriage, or to

---

[41] *Amicus* does not address the other purported rationales for compelled spousal notification because psychological evidence has little if any bearing on them.

[42] Ryan & Plutzer, *supra* n.5, at 47.

[43] *See generally* D. CURRAN, TRAITS OF A HEALTHY FAMILY (1983).

one or both of the parties.[44] As the District Court concluded, "not only could forced notice hasten the dissolution of a troubled marriage, but it could have potentially disastrous consequences, including subjecting the woman to physical abuse." 744 F. Supp. at 1388. As in *Hodgson*, "[i]n these circumstances, the statute [is] not merely ineffectual in achieving the State's goals but actually counterproductive." 110 S. Ct. at 2945.

II. THE "INFORMED CONSENT" PROVISIONS OF THE PENNSYLVANIA ACT ARE UNCONSTITUTIONAL.

In *Akron*, this Court noted: "The validity of an informed consent requirement . . . rests on the State's interest in protecting the health of the pregnant woman." 462 U.S. at 443. Two principles limit state regulation designed to ensure that a woman's decision is "informed and freely given and is not the result of coercion."[45] The State must (1) defer to the judgment of health care professionals involved in counseling the woman and performing the abortion, and (2) respect the woman's constitutionally protected right to exercise her choice unburdened by the State's coercive efforts to inject its policy preferences into her decision-making process. *Thornburgh*, 476 U.S. at 762; *Akron*, 462 U.S. at 443-44. *See Thornburgh*, 476 U.S. at 830-31 (O'Connor, J., dissenting) (state-compelled information cannot be irrelevant, inaccurate, or inflammatory). The "informed consent" provisions of the Pennsylvania Act violate these principles.

At the outset, Sections 3205 and 3208 confuse two separate and distinct processes—obtaining "informed consent" and pre-abortion counseling. Informed consent is a legal doctrine that requires physicians to obtain consent for any diagnostic procedure or treatment that "touches" the person. Informed consent for abortion focuses on the

[44] From the data available, it is not even clear that *voluntary* notification about a planned abortion enhances the marital relationship. Ryan & Plutzer, *supra* n.5, at 42, 45.

[45] *Planned Parenthood v. Danforth*, 428 U.S. 52, 85 (1976).

material, non-remote *medical* risks associated with the specific procedure to be performed.[46] Customarily, it is obtained immediately prior to the procedure, and does not entail discussion of the myriad non-medical factors that inform women's decision whether to terminate their pregnancies.

The information required by the Act goes far beyond the medical subject matter relevant to "informed consent." Much of the information—in particular that required by Sections 3205(a)(2) and 3208—has nothing to do with the medical risks of abortion or its alternatives. Rather, it relates to social, cultural and economic issues associated with carrying a pregnancy to term. In the guise of obtaining "informed consent," the Pennsylvania Act thrusts health care professionals into the woman's broader decision-making process and involves them in what is more appropriately done in pre-abortion counseling.

Properly done, pre-abortion or "options" counseling can be helpful to women in making a decision regarding the outcome of an unplanned or unwanted pregnancy; it is meant to assist them in weighing their options. It should not be imposed on pregnant women, many of whom prefer to consider non-medical issues affecting this personal decision in private or with relatives or friends. Unlike the information mandated by the Pennsylvania Act, options counseling is provided in circumstances when and where it is needed and wanted by the particular patient.

As discussed *infra*, the "counseling" the Act dictates is not appropriate. It forces health care professionals to convey misleading and ideologically skewed information, and forces every woman seeking an abortion to listen to a fixed litany of information irrespective of her individual needs and wants, or its impact on her.

[46] *See Akron*, 462 U.S. at 443 (construing "informed consent" to mean "the giving of information to the patient as to just what would be done and as to its consequences").

A. The "Informed Consent" Provisions Require The Dissemination Of Exaggerated And Misleading Information That May Be Harmful To Women.

In the guise of "informed consent," the Act's requirements affirmatively deceive pregnant women seeking abortions. Section 3208 requires health care professionals to offer materials containing "objective information describing . . . the possible detrimental psychological effects of abortion." 18 Pa. C.S.A. § 3208(a)(2). Singling out abortion for the recitation of purported detrimental effects conveys the false and misleading impression that abortions are more likely than alternatives to abortion to produce such detrimental effects.[47] Indeed, research shows that substantial adverse emotional and psychological consequences to having an abortion are very rare. And the alternatives are not always psychologically benign. Studies demonstrate that potential negative psychological consequences may result from bearing and raising a child or relinquishing a child for adoption.[48]

---

[47] To the extent the likely psychological consequences of the decision whether to abort or carry an unwanted pregnancy to term are pertinent to a particular woman when deciding whether to have an abortion, studies of women's psychological responses following abortion and term birth have found few differences. When differences were found, early abortion was associated with more positive effects. Russo & Zierk, *supra* n.35, at 3-4.

[48] Having a child can be associated with a variety of stressful outcomes: women's risk for depressive symptoms, including low self-esteem, is higher among women with young children, and increases with the number of children. Russo & Zierk, *supra* n.35, at 5. Anywhere from 50-80% of mothers experience postpartum "blues" (mild depression, mood instability, and anxiety). Postpartum depression is suffered by 10% of mothers, and nearly .02% of women suffer full-blown psychoses after birth. Harding, *Postpartum Psychiatric Disorders: A Review*, 30 Comprehensive Psychiatry 109, 109-110 (1989). There is also evidence suggesting that women who relinquish a child for adoption are at high risk for negative psychological consequences, which may not diminish over decades. Condon, *Psychological Disability In Women Who Relinquish a Baby For Adoption*, 144 Med. J. of Australia 117, 117-19 (1986); Deykin, Campbell & Patti, *The Postadoption Experience of Surrendering Parents*, 54 Am. J. Orthopsych. 271 (1984). In addition, negative emotions—anger, sadness, and guilt—may intensify over time. *Id.*

Psychological reactions after abortion are complex and may include both negative and positive responses. Importantly, a woman's response to abortion cannot be separated from the effects of the stressful experience of an unwanted pregnancy. In this context, it is not surprising that the great majority of women who have had abortions express feelings of relief and happiness.[49] Indeed, positive emotions are more often experienced and experienced more strongly than negative emotions, both immediately after the abortion as well as in the months following.[50] And the positive feelings increase over time whereas any negative feelings diminish.[51]

Abortion rarely causes or exacerbates psychological or emotional problems. When women do experience regret, depression, or guilt, such feelings are mild and diminish rapidly without adversely affecting general functioning.[52] The few women who do experience negative psycholog-

---

[49] *E.g.*, Adler, *supra* n.38, at 41; Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 74 (G. Melton ed. 1986) [hereinafter Adler & Dolcini]; Russo & Zierk, *supra* n.35, at 20-21; Lazarus, *Psychiatric Sequelae of Legalized Elective First Trimester Abortion*, 4 J. Psychosomatic Obstetrics & Gyn. 141 (1985) [hereinafter Lazarus]; Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortion*, 42 Am. J. Orthopsych. 48 (1972).

[50] *E.g.*, Russo & Zierk, *supra* n. 35, at 3; Adler, *supra* n.38, at 41. Research suggests that women who show no evidence of severe negative responses either a few months or up to a year after having an abortion are unlikely to develop future significant psychological problems related to the experience of abortion. Russo & Zierk, *supra* n.35, at 6, 24; Adler, *supra* n.38, at 43.

[51] *E.g.*, Adler & Dolcini, *supra* n.49, at 84; Adler, *Emotional Responses of Women Following Therapeutic Abortion*, 45 Am. J. Orthopsych. 446, 447 (1975).

[52] *E.g.*, Adler & Dolcini, *supra* n.49, at 84; Adler, *supra* n.38, at 41, 43; Russo & Zierk, *supra* n.35, at 2-3, 24.

ical responses after abortion appear to be those with preexisting emotional problems or who choose to abort because of medical or genetic indications rather than because the pregnancy is unwanted.[53] Case studies suggest that the greater the difficulty in deciding to terminate the pregnancy—either because of negative feelings about abortion, perceived social stigma, or lack of support—the more likely there will be a negative response afterwards.[54] In addition, some women have little access to resources that enable them to cope with stressful situations generally and are therefore at risk for psychological distress whether their unwanted pregnancy is resolved by abortion *or birth*.[55] The conclusions from the most rigorous scientific studies are consistent: for the overwhelming majority of women who undergo abortion, there are no long-term negative emotional effects.[56] As

---

[53] *E.g.*, Russo & Zierk, *supra* n.35, at 3; Adler & Dolcini, *supra* n.49, at 84; Lazarus, *supra* n.49; Blumberg & Golbus, *Psychological Sequelae of Elective Abortion*, 123 Western J. Med. 188 (1977); Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsych. 503 (1977).

[54] Adler, *supra* n.38, at 42.

[55] Russo & Zierk, *supra* n.35, at 22. Evidence suggests that a woman's coping resources associated with employment, income, and education are more important to her psychological well-being than whether or not she has had an abortion. *Id.* at 26.

[56] *E.g.*, Adler, *supra*, n.38, at 41, 43 (reviewing research); Russo & Zierk, *supra* n.35, at 2-3; Adler, *Psychological Responses of Women Following Abortion* (1989) (testimony on behalf of APA to Subcommittee on Human Resources and Intergovernmental Relations of the House of Representatives Committee on Government Relations); Marecek, *Consequences of Adolescent Childbearing and Abortion* in ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 96 (G. Melton ed. 1986) [hereinafter Maracek]; NATIONAL ACADEMY OF SCIENCES/INSTITUTE OF MEDICINE, LEGALIZED ABORTION AND THE PUBLIC HEALTH (1975); Adler & Dolcini, *supra* n.49; Shusterman, *The Psychological Factors of the Abortion Experience: A Critical Review*, 1 Psychology of Women Q. 79 (1976).

former Surgeon General C. Everett Koop testified before Congress, the development of significant psychological problems related to abortion is "miniscule from a public health perspective." [57]

In sum, it is grossly misleading to tell a woman that abortion imposes possible detrimental psychological effects when the risks are negligible in most cases, when the evidence shows that she is more likely to experience feelings of relief and happiness, and when child-birth and child-rearing or adoption may pose concomitant (if not greater) risks of adverse psychological effects for some women depending on their individual circumstances. Such inaccuracies are likely to lead to unnecessary anxiety and may actually produce negative post-abortion reactions where they would not otherwise have occurred.[58]

The fact that this misinformation is "offered" to every pregnant woman seeking an abortion, rather than being forced upon her, is a distinction without a difference. *See Thornburgh*, 476 U.S. at 831 (O'Connor, J., joined by Rehnquist, C.J.). When a health care provider offers a brochure to a patient and describes its contents, and states that "a copy will be provided to her free of charge if she chooses to review it," 18 Pa. C.S.A. § 3205(a)(2)(i), that offer carries the weight of a recommendation. A patient may justifiably conclude that a health care provider would not offer her material that was not relevant and meaningful to her medical procedure. In practice and effect, Section 3208 exploits the trust critical to the health care provider-patient relationship.

---

[57] HOUSE COMM. ON GOVERNMENT OPERATIONS, THE FEDERAL ROLE IN DETERMINING THE MEDICAL AND PSYCHOLOGICAL IMPACT OF ABORTIONS ON WOMEN, H.R. REP. No. 329, 101st Cong., 2d Sess. 14 (1989).

[58] One study revealed that exposing women to unfounded claims that abortion will have severe and long-term negative psychological effects could undermine their ability to cope with the abortion experience. Russo & Zierk, *supra* n.35, at 7.

B. The Mandatory Disclosure Provisions Interfere With Effective Counseling And Are Designed Not To Inform But To Bias Women Against Having Abortions.

Even apart from the exaggerated and misleading information concerning the psychological sequelae of abortion, the "informed consent" provisions are harmful because they require the physician and/or other health care professional to recite and make available a specified list of information to every woman before obtaining her consent to an abortion. This Court has twice struck down such requirements. *Thornburgh*, 476 U.S. at 759-64; *Akron*, 462 U.S. at 444-45. As the Court recently explained, such laws are unconstitutional because they "require[] *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision." *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991) (emphasis in original).

Effective counseling requires the exercise of professional judgment regarding what should *not* be said, as well as what should be said, in a particular situation. There is no universal set of information that is appropriate for every patient. Pregnant women approach the possibility of abortion with widely varying backgrounds, attitudes, levels of knowledge and familial and social support systems. To be effective, the *content* of the counseling must be tailored to those individual differences and needs. Each woman is unique and should receive only the counseling she agrees to based on her needs and wants, and at the appropriate time—during the decision-making process. Sections 3205 and 3208 preclude the exercise of such professional discretion and judgment. The "counseling" techniques these provisions mandate are contrary to the currently accepted practice of health care professionals,[59] and are likely to undermine women's well-being.

[59] *See* American Psychological Ass'n, *Ethical Principles of Psychologists*, 45 Am. Psychologist 390 (1990) (instructing psychologists to treat people as individuals, with full respect for their individual differences); APA's Criteria for Accreditation of Doctoral Training Programs and Internships in Professional Psychology in APA COMMITTEE ON ACCREDITATION, ACCREDITATION HANDBOOK (1980) (noting importance of respect for individual differences).

For example, the requirement that every woman be informed that "[m]edical assistance benefits may be available for prenatal care, childbirth and neonatal care," and that "the father . . . is liable to assist in the support of her child" (18 Pa. C.S.A. § 3205(a)(2)(ii) & (iii)), may be irrelevant to a woman for whom an abortion is required as a life-preserving measure or for genetic reasons. Further, the requirement that such information be communicated may interfere significantly with a health professional's ability to counsel such a woman effectively, particularly if she has moral, religious or other personal beliefs that make her ambivalent. Informing a woman who believes that she has no effective alternative to abortion of the potential liability of the father if she carries to term, or the possible availability of medical assistance benefits for child-birth, may increase any depression and anxiety regarding the procedure and thereby increase her stress and interfere with her recovery. *See Thornburgh*, 476 U.S. at 764. Rigid, mandatory disclosure requirements such as Section 3205 fail to allow for situations in which the provision of certain information to a particular patient would result in anxiety, fear or emotional distress. As the Supreme Court held in *Thornburgh*, "[t]his type of compelled information is the antithesis of informed consent." *Id.*

It is not the counselor's role to guide the woman to a particular outcome. Effective options counseling must provide the woman with only information that is relevant to her particular situation, and must offer a neutral and balanced presentation and discussion of all relevant facts. Additionally, it is essential for women who request and need counseling to discuss not only the "medical risks" of carrying the pregnancy to term, as Section 3205 requires (18 Pa. C.S.A. § 3205(a)(1)(i) & (iii)), but also

the social, economic, emotional and psychological risks of the alternatives to abortion, disclosure of which the Act does not mention. Such counseling should focus on the issues—such as consequences for the woman's relationship with the father and her children, her economic status, moral and religious beliefs, and attitudes toward adoption—that are of primary importance for many women in the abortion decision.[60]

In fact, the Pennsylvania Act is designed more to bias a woman's choice than to inform it. Like the almost identical provisions struck down in *Thornburgh*, Sections 3205 and 3208 "require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.'" 476 U.S. at 760, quoting *Akron*, 462 U.S. at 443-44. Apart from the misleading nature of the psychological "information" contained in the government-created brochure, the stipulated information gives the strong impression that the Commonwealth disapproves of the woman's decision to abort; it is clearly designed to deter pregnant women from making that choice.[61]

---

[60] A recent empirical study found that women's abortion decision reflects a desire to optimize the quality of marriage and childbearing, and to reduce risk of physical, psychological, social, and economic disadvantage for themselves and their existing and future children. Russo, *supra* n.5, at 21. The abortion decision is complex, involving many factors. In general, however, reasons associated with developmental level or life stage play a critical role: 11% of the women in the study indicated that they were "not mature enough" or were "too young" to have a child, while another 21% gave "unready for the responsibility" as the most important reason for having an abortion. Twenty-three percent mentioned that a husband or partner wanted the abortion; 68% mentioned inability to afford a baby. *Id.* at 12.

[61] Under Section 3205, the woman must be told about alternatives to abortion and the gestational age of the "unborn child," 18 Pa. C.S.A. § 3205(a)(1)(i) & (ii), and she must be told about possible medical assistance benefits if she carries the pregnancy to term and paternal liability for child support, *id.* § 3205(b)(ii) & (iii). The material offered and made available by the health care provider must include a state-compiled list of agencies offering abortion alternatives and "pictures representing the development of unborn children at two-week gestational increments, and any relevant information on the possibility of the unborn child's survival." *Id.* § 3208(a)(2); *see id.* § 3205(b)(i).

The District Court found that, in some cases, merely offering this material "will create undesirable and unnecessary anxiety, anguish and fear." 744 F. Supp. at 1354. As the Court determined in *Thornburgh*, the mandated description of fetal characteristics at two-week intervals, no matter how objective, "is not medical information that is always relevant to the woman's decision, and it may serve only to confuse and punish her and to heighten her anxiety, contrary to accepted medical practice." 476 U.S. at 762.

[62] As the Court concluded in *Thornburgh*, "[f]orcing the physician or counselor to present [this information] to the woman makes him or her in effect the agent of the State in treating the woman and places his or her imprimatur upon [the material]." 476 U.S. at 763.

[63] *See supra* at 22.

The Act converts health care providers into advocates for the State in seeking to discourage women from terminating their pregnancies.[62] This role is the antithesis of effective and appropriate counseling, does not provide the professional guidance the woman is entitled to expect, and is likely to be highly destructive of the patient-counselor relationship. Indeed, like the exaggerated and misleading information concerning the adverse psychological sequelae of abortion, the provision of a disapproving official message may harm the woman it is purportedly intended to assist: studies show that women who believe that their decision to have an abortion is not supported or is stigmatizing run an increased risk of negative post-abortion emotional and psychological reactions;[63] the Pennsylvania Act's strongly biased presentation, which the health-care provider is forced to communicate, may convey just such a non-supportive, stigmatizing message.

C. The Twenty-Four Hour Mandatory Delay Severely Burdens A Woman's Right To Choose.

The requirement that every woman wait 24 hours between disclosure of the biased mandatory "informed

consent" information and the abortion procedure imposes still other burdens on a woman's right to obtain an abortion. *See* 18 Pa. C.S.A. § 3205(a). In *Akron*, this Court concluded that the State "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible [24-hour] waiting period," and held that such a mandatory delay was unconstitutional. 462 U.S. at 450. The Court noted that the waiting period increased the cost and risk of obtaining an abortion, *inter alia*, because scheduling difficulties effectively delayed the planned abortion more than 24 hours. *Id.* This conclusion was correct.[64]

In many geographic areas of the country, women live long distances, even hundreds of miles, from the nearest abortion provider.[65] Research has shown that the greater the distance from a provider, the less likely a woman is to gain access to the abortion service.[66] The lack of local services can result in numerous difficulties for women seeking an abortion: travel expenses, overnight lodging, loss of pay, and jeopardized privacy because of

[64] Both lower courts found that Pennsylvania's 24-hour waiting period may result in significantly longer waits (up to two weeks) and will require every woman to make at least two visits to a clinic or doctor's office rather than one, thereby increasing the cost of the procedure, sometimes significantly. 744 F. Supp. at 1351-52, 1378-79; 947 F.2d at 706.

[65] The abortion patients of one petitioner in this case come from an 18-county area; many of those counties have no abortion providers. 744 F. Supp. at 1341. Another petitioner serves a significant number of patients who travel in excess of two hours to the clinic. *Id.* at 1338.

[66] Shelton, Brann & Shultz, *Abortion Utilization: Does Travel Distance Matter?*, 8 J. Fam. Planning Perspectives 260 (1976); Henshaw & Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 J. Fam. Planning Perspectives 102, 105 (1990) [hereinafter Henshaw & Van Vort]. A national survey of abortion providers in 1989 found that 83% of U.S. counties have no identified abortion services. In non-metropolitan areas, 93% of the counties are without a provider, and 83% of all non-metropolitan women reside in these counties. Henshaw & Van Vort, *supra*, at 106.

absence from work and/or home for a significant period of time.[67] For battered women who cannot inform their husbands, these burdens may be insurmountable.

To add a 24-hour mandatory waiting period will impose an excessive burden on many women, and for some women may prevent them from receiving an abortion.[68] A mandatory waiting period needlessly increases the health risks of an abortion.[69] It also greatly increases the risk of physical or psychological harm to women in abusive relationships.[70] As the Court ruled in *Akron*, "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." *Id.* at 450-51.[71]

[67] *Id.* at 105.

[68] *See id.* at 108.

[69] The risk of complications increases with each week of delay, especially after the first eight weeks. *See* R. Gold, Abortion and Women's Health: A Turning Point for America? 29 (Figure 15) (1990); C. Tietze & S. Henshaw, Induced Abortion: A World View 1986 104 (Table 16) (6th ed. 1986).

[70] The burden of this delay and required additional trip "falls most heavily on battered wives who often find it difficult to free themselves from their husband's surveillance." 947 F.2d at 706; *accord* 744 F. Supp. at 1379. *See supra* at 8 & n.15.

[71] In *Hodgson*, the Court upheld a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion before undergoing the procedure. The Court concluded that the waiting period was not an inappropriate length of time to allow the minor to consult with her parent. *See* 110 S. Ct. at 2944 (Stevens, J., joined by O'Connor, J.); *id.* at 2969 (Kennedy, J., joined by Rehnquist, C.J., White and Scalia, JJ.). Pennsylvania's 24-hour waiting period is very different, as members of the *Hodgson* Court acknowledged. It, like the provision invalidated in *Akron*, requires a mature woman, capable of consenting to abortion, to wait after giving her consent before undergoing the abortion. *See id.* at 2944 n.35 (Stevens, J., joined by O'Connor, J.). Significantly, the statute in *Hodgson* did not require any delay once the designated competent decision-maker consented to the abortion. *See id.*

The small proportion of women who are ambivalent about having an abortion and who require additional time to make a considered decision can be afforded that time; counselors are trained to identify and advise such women.[72] But the Commonwealth's assumption that *every* woman must have 24 hours to rethink her decision is unsupported by the evidence. Contrary to the court of appeals' suggestion, there is no evidence that women in general are making unduly hasty or inadequately considered decisions to have abortions.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Third Circuit should be affirmed insofar as it struck down the spousal notification provision of the Penntsylvania Act, and reversed insofar as it upheld the "informed consent" and 24-hour waiting period provisions of the Act.

Respectfully submitted,

DAVID W. OGDEN *
ANN M. KAPPLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Attorneys for Amicus Curiae

* Counsel of Record

March 6, 1992

---

[72] The District Court found this is the practice in Pennsylvania. 744 F. Supp. at 1351 (noting trial testimony that "[a]rrangements for special counseling sessions are made for women demonstrating any ambivalence about [their] decision"). *Accord id.* at 1338 ¶ 76; *id.* at 1340 ¶ 104; *id.* at 1342 ¶ 123.